STATE OF MICHIGAN

COURT OF APPEALS

BRANDEE LYNN QUAINTANCE,

Plaintiff-Appellant,

v

JOHN FREDRICK RICHARDS,

Defendant-Appellee.

UNPUBLISHED
November 15, 2002

No. 241775
Osceola Circuit Court
LC No. 99-008405-DP

Before: Murphy, P.J., and Sawyer and R. J. Danhof*, JJ.

PER CURIAM.

Plaintiff appeals as of right from the order changing physical custody of the parties' minor child from plaintiff to defendant. We reverse and pursuant to our authority under MCR 7.216(A)(7) enter an order continuing physical custody of the minor child with plaintiff because there did not exist clear and convincing evidence supporting a change of custody.

On March 6, 2002, a hearing was conducted with regard to defendant's petition to change custody. After considering the testimony, the trial court determined that an established custodial environment existed with plaintiff's mother, but not with either of the parties. It therefore ruled that, because the custody contest was between the parents, defendant only needed to show by a preponderance of the evidence that a change of custody would be in the child's best interests. The court then considered the statutory best interest factors, MCL 722.23, and concluded that the parents were equal with respect to all of the factors except factors (e) and (l). The court accordingly granted physical custody of the child to defendant and plaintiff has appealed.

This Court applies three standards of review in custody cases. *LaFleche v Ybarra*, 242 Mich App 692, 695; 619 NW2d 738 (2000). The great weight of the evidence standard applies to all findings of fact. *Id.* Under that standard, the trial court's findings will be sustained unless the evidence clearly preponderates in the opposite direction. *Id.* An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. *Id.* Finally, "[t]he clear legal error standard applies where the trial court errs in its choice, interpretation, or application of the existing law." *Foskett v Foskett*, 247 Mich App 1, 4-5; 634 NW2d 363 (2001).

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

The burden of proof is always on the party seeking to change custody – in this case, defendant. *Mann v Mann*, 190 Mich App 526, 535; 476 NW2d 439 (1991).

Plaintiff first contends that the trial court erred by determining that there was an established custodial environment only with the child's grandmother; therefore, as between the parties, there was no established custodial environment. Plaintiff argues that she was awarded physical custody of the child and that both she and her mother jointly established the environment that provided "guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c).[1]

A custody award may be modified on a showing of proper cause or change of circumstances that establishes that the change is in the child's best interest. *LaFleche, supra* at 695. The *LaFleche* panel stated:

> Where no established custodial environment exists, the trial court may change custody if it finds, by a preponderance of the evidence, that the change would be in the child's best interests. However, where an established custodial environment does exist, a court is not to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. [*Id.* at 696 (citations omitted).]

In *LaFleche*, *id.* at 694, the child and her mother lived with the maternal grandparents. This Court agreed with the trial court that an established custodial environment existed with the grandparents,[2] and then held

> The dispute in this case was not between plaintiff and the maternal grandparents. Although Brooklyn and defendant resided with the grandparents, defendant had legal custody of Brooklyn. Moreover, the maternal grandparents were not seeking legal custody of the child and had not, themselves, opposed plaintiff's petition to modify physical custody. The custody dispute was between

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[1] MCL 722.27(1)(c) provides, in relevant part:

> The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to the permanency of the relationship shall also be considered.

[2] This Court observed: "[I]t is clear from the evidence presented at the custody hearing that Brooklyn's grandparents provided her with a home, cared for her, arranged for her school and extracurricular activities, transported her to visitations with her father, and looked after Brooklyn during defendant's periodic absences. Under these circumstances, it is clear that an established custodial environment existed in the grandparents' home." *LaFleche*, *supra* at 698, n 4.

> plaintiff and defendant, the natural parents. Under these circumstances, where the dispute is between the natural parents, clear and convincing evidence must be presented to justify a change in custody. MCL 722.25(1). Therefore, the trial court did not err in requiring plaintiff to present clear and convincing evidence to warrant a change in physical custody. [*LaFleche, supra* at 698-699.]

The *LaFleche* determination is equally applicable to this case. An established custodial environment existed in the grandmother's house. Plaintiff, a parent, had physical and legal custody of the child pursuant to court orders; she lived in her mother's home with her mother and the child; she either made by herself, or participated jointly in making, most of the decisions regarding the child; and she had a loving relationship with the child from the time of her birth.[3] There was an established custodial environment and the dispute was between the parents. Therefore, defendant was required to show by clear and convincing evidence that a change of custody was warranted. The trial court erred by concluding that defendant was only required to show by a preponderance of the evidence that a change of custody was in the child's best interest.

Having found that the trial court applied the incorrect evidentiary test, we find it unnecessary to remand this case for any more hearings or for the court to make a new custody determination based on the clear and convincing standard of proof. The trial court analyzed the statutory best interest factors, MCL 722.23, and found this to be a close case with the parties being equal on all of the factors except for only two; both of which would be significant when applying the preponderance of the evidence test, but not when applying the clear and convincing test.

In *Baker v Baker*, 411 Mich 567, 576-577; 309 NW2d 532 (1981), our Supreme Court, addressing the clear and convincing evidence test found in MCL 722.27, stated:

> In adopting § 7(c) of the [Child Custody Act of 1970], the Legislature intended to minimize the prospect of unwarranted and disruptive change of custody orders and to erect a barrier against removal of a child from an "established custodial environment", *except in the most compelling cases.* [Emphasis added.]

Based on the trial court's factual findings concerning the child custody factors, it cannot be said that there existed compelling reasons to change the child's established custodial

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[3] This Court has held that an established custodial environment can exist in more than one home, as, for example, where two parents share joint custody of their child and they both provide parental guidance, comfort, discipline, and the necessities of life. *Mogle v Scriver*, 241 Mich App 192, 197-198; 614 NW2d 696 (2000). Although the child's maternal grandmother was more consistently involved in the child's day-to-day care, plaintiff was also involved in providing guidance, comfort, discipline, and the necessities of life for the child, and we see no reason why plaintiff and her mother working in concert should deprive plaintiff of the evidentiary benefit.

environment. Therefore, clear and convincing evidence was lacking and the previous physical custody award to plaintiff should not have been modified.

Reversed and an order continuing physical custody of the minor child with plaintiff is hereby entered.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Robert J. Danhof